v. *Davies*, 40 Ark. 200 The requirement to keep a journal does not make it necessary that it should be signed, or that the accuracy of the copy thereof be certified to: *Miller* v. *Goodman*, 70 Ill. 659. J. R. BERRYMAN.

Madison, Wis.

RECENT ENGLISH DECISIONS.

Queen's Bench Division.

HAINES *v.* GUTHRIE.

In an action for the price of goods sold and delivered the defendant pleaded infancy. He sought to prove the plea by a statement contained in an affidavit made in a chancery suit, to which the plaintiff was not a party, by the defendant's fatner, since deceased.

Held, that there being no question of pedigree in the case, the evidence was not admissible.

APPEAL of the defendant from the judgment of STEPHEN and MATHEW, JJ.

In an action for 731*l.* for goods sold and delivered, the defendant pleaded that at the time of the alleged purchase he was an infant under the age of twenty-one years, and that the things were not necessaries. The trial before GROVE, J., and a special jury resulted in a verdict for the plaintiff for 4*l.* 16*s.*, for things which were found to be necessaries. The plaintiff applied for a new trial, on the ground of the improper reception of evidence in favor of the defendant.

The evidence in question was admitted in support of the plea of infancy, and consisted of a statement as to the date of the defendant's birth, contained in an affidavit made in a chancery suit, to which the plaintiff was not a party, by the defendant's father, who had since died.

STEPHEN and MATHEW, JJ., having ordered a new trial,

The defendant appealed.

Willis, Q. C., and *L. Glyn*, for the defendant.

Lumley Smith, Q. C., and *H. D. Greene*, for the plaintiff.

BRETT, M. R.—In this case the action was for the price of certain goods sold by the plaintiff to the defendant, and the sale must have been either for an agreed price or for a reasonable price. The

defence is that at the time when the bargain was made, supposing it was for an agreed price, it was not binding, because at that time the defendant was under twenty-one years of age. We have to consider what is the rule of evidence which may be applicable to this and to many other cases. The evidence which was said to have been admissible was a declaration in an affidavit by the defendant's father, who had since died, as to the date of the defendant's birth, and, if it were admissible, it would be very strong evidence to show that when the defendant made this bargain he was under twenty-one years of age. Then arises the question whether in such a suit as this, upon such a dispute as this, with regard to such an issue as this, that evidence was admissible. It is obvious that the question of what family the defendant belonged to is wholly immaterial, as also is the question of whose son he was. The question whether he was a legitimate or natural son, or an elder or younger son, is also wholly immaterial. There is no question of family in the matter. The question is of the time when he was born, and that has nothing to do with any family question which can be suggested. Then arises this problem: Can this evidence, with regard to such a question so stated, be received in evidence against the present plaintiff? It cannot be, of course, unless there is some rule of law by which a mere declaration upon such a question so stated is evidence against all the world. It cannot be doubted that this is what is called hearsay evidence, which, as a general rule, is not admissible. Therefore the case must be brought within the recognised exceptions to that rule. It seems to me that the case cannot be argued merely upon principle. The law of evidence in England has been determined by the authority of successive decisions of the courts. It is a branch of law which depends entirely upon the authority of the courts; therefore we must look to the decisions to see whether this exception to the acknowledged rule has ever been admitted. There are many well-known exceptions which it would be difficult to make out for the first time to be rightly admitted. Nay, there are great authorities who think that the original rule is bad for the purpose of arriving at the truth. But it is no part of the province of the court to consider whether that rule is good or bad, or to enunciate a new principle with regard to those exceptions; we must see what are the recognised exceptions.

Now, we have a recent declaration of what the exceptions are by

Lord BLACKBURN, who enumerates them in *Sturla* v. *Freccia*, 5 Appeal Cases, at page 640. He says: "It is not disputed that the general rule of English law is that hearsay evidence is not receivable; one reason probably is the want of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not see that if we were but beginning to make the law we should be able to say exactly why so much should be admitted and no more; probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those. Now, the first and one of the most important exceptions is briefly expressed in a *dictum* in *Higham* v. *Ridgway*, 10 E. 109, that documents on the face of them appearing to be against the interest of a deceased person who stated the matter are evidence. I need not enter into the qualifications of that further than to point out that in no point of view can this *Giunta di Marina* who made this statement (and who presumably are all dead by this time) be said to have been making statements against their own pecuniary interests. Then there is a second class of cases, of which *Price* v. *Lord Torrington*, 1 Salk. 285, may be mentioned as being the earliest, establishing that where a deceased person in the course of his duty makes a contemporaneous entry of an act which he has done, and returns that in the course of his business, then after his death it would be received as evidence. That class of cases is also well established. There, again, I do not go into the qualifications, or express any opinion upon the different matters introduced, further than to point out that in no sense can it be said that the *Giunta di Marina* was making any statement in the course of business contemporaneous with the fact, and it is impossible to say that it falls within that principle. Then comes another large class of cases, where, from the nature of the thing, evidence of reputation from deceased persons is admissible; where it is a public right, or a *quasi* public right, evidence of reputation is admissible if you prove that the deceased person was of the class who would know it and had stated it. Upon that, again, I merely say that the question we are now inquiring into—viz., the history of a private individual—is not a matter in which, in any sense, reputation generally can be received. Then there is another class of cases which comes nearer to it. It has been estab-

lished for a long while that, in questions of pedigree—I suppose upon the ground that they were matters relating to a time long past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice—but, for whatever reason, the statement of deceased members of the family made *ante litem motam*, before there was anything to throw doubt upon them, are evidence to prove pedigree, and such statements by deceased members of the family may be proved, not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree, that evidence would be receivable, its weight depending upon other circumstances."

I take it that Lord BLACKBURN intended to make an exhaustive enumeration of the exceptions; therefore the exception which is applicable here is, where there is a question of pedigree to prove which the evidence is given. If that is true, and it is true, as I have stated, that there is no question of family at all in this matter, how can any one say that this evidence was given in a question of pedigree to prove pedigree? The case is not brought within the exceptions; therefore it would be wrong to try and explain all the cases cited. There is not a decision, but a strong opinion of PATTESON, J., in *Figg* v. *Wedderburn*, 11 L. J. Q. B. 45, that, in such a case, the question is not one of pedigree, and therefore the evidence is not admissible. So also, in *Plant* v. *Taylor*, 7 H. & N. 227, POLLOCK, C. B., says that, in an action for the price of goods sold and delivered, the declarations of deceased persons are not admissible to prove that the defendant is an infant, though it is different where the question is one of pedigree. For the reasons I have given, I take it this is not a question of pedigree within the meaning of that word as used by the judges when they established the exceptions. Therefore the case is not within any exception to the rule against the admissibility of hearsay evidence. On that ground I am of opinion that the evidence was not admissible, and, therefore, that the decision of the Divisional Court was right, and that the appeal must be dismissed.

BOWEN, L. J.—I am of the same opinion. I only add a word in order to emphasize the exact point which this case decides—viz.

that, in such a suit as this, upon such an issue as this, the declaration of a deceased person is not admissible to prove infancy, the question not being as to any family at all, but as to the age of the particular defendant.

FRY, L. J.—I am entirely of the same opinion. The law laid down by Ld. BLACKBURN in the House of Lords was exactly that laid down a hundred years ago in *R.* v. *Inhab. of Eriswell*, 3 T. R. 707, by Ld. KENYON, who said: "I admit that declarations of the members of a family, and perhaps of others living in habits of intimacy with them, are received in evidence as to pedigrees; but evidence of what a mere stranger has said has ever been rejected in such cases. That, however, has been always understood to be an excepted case and to stand on reasons peculiar to itself, which I need not take up time by stating." Therefore he states that the exception is confined to questions of pedigree. The question here is simply whether the defendant had attained the age of twenty-one; any question as to the father or mother of the defendant is wholly immaterial; therefore, there is no question of pedigree in this case. I am therefore of opinion that the appeal must be dismissed.

Appeal dismissed

The burden of proving the fact of infancy is on the defendant who sets it up, being one of those facts peculiarly within his knowledge: *Borthwick* v. *Carruthers*, 1 T. R. 648; *Stewart* v. *Ashley*, 34 Mich. 183; *Jeune* v. *Ward*, 2 Stark. 330; *Bay* v. *Gunn*, 1 Denio 108; *Hartley* v. *Wharton*, 11 Ad. & El. 934. And ordinarily it should be proved, like any other fact, by competent evidence; and proof "by inspection" has been thought not to be a part of our law: Met. on Cont., p. 44. Still, if the defendant offers himself as a witness, the jury may take into consideration his appearance, as that *may* furnish satisfactory evidence that he was or was not of age, at some particular time; though not establishing the exact date of his birth: *Commonwealth* v. *Emmons*, 98 Mass. 8. And a person himself may testify to his own age: *Hill* v. *Eldridge*, 126 Mass. 234; *Cheever* v. *Congdon*, 34 Mich. 296; *State* v. *Cain*, 9 W. Virg. 568. So, of course, may his relatives who have known him personally from his infancy: *Kellogg* v. *Kimball*, 126 Mass. 163.

Entries of a baptism on a baptismal register, made in the course of official duty, though not direct evidence of the date of a person's birth stated therein, may still be used to prove the *date* of baptism, as well as the fact, and with evidence *aliunde* of the person's age at his baptism, may indirectly aid in establishing the date of his birth: *Whitaker* v. *McLaughlin*, 115 Mass. 168. And that such entry is proof of the date of baptism as well as the fact, see the interesting opinion of GRAY, J., in *Kennedy* v. *Doyle*, 10 Allen 161.

As to the precise point involved in the principal case, the American text-writers *seem* to confine the admissibility of such evidence to cases where the issue on trial involves some question of pedigree or re

lationship. Thus, Dr. Wharton, in 1 Wh. Ev., p. 208, says: "Pedigree, if we are to understand it as co-extensive with the facts to prove which evidence of the class before us is admissible, includes not merely the relationships of families, but the dates of the births, deaths and marriages of its members, *when the object of such evidence is to trace relationship*. For *this* purpose the declarations of deceased relatives are admissible."

Prof. Greenleaf uses similar language; thus: "The term pedigree, however, embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. These facts therefore may be proved in the manner above mentioned, in all cases where they occur incidentally, and *in relation to pedigree*:" 1 Greenl. Ev., § 104. And this rule has been frequently followed in America to prove the time of a birth or death, when that fact is incidentally involved in a question of pedigree or relationship. See *Am. Life Ins. Co.* v. *Rosenagle*, 77 Penn. St. 516; *Morrill* v. *Foster*, 33 N. H. 386.

On the other hand such evidence, viz., declarations of deceased relatives, seems to have been sometimes admitted, where no question of pedigree or relationship was at all involved, but only the age or birth of a particular person; as when a defendant is sued on contract, and pleads his infancy in defence, he has been allowed (contrary to our principal case) to prove such fact by the declarations of parents then deceased. See *Watson* v. *Brewster*, 1 Penn. St. 383; *Clements* v. *Hunt*, 1 Jones (Law) 400. But the better opinion seems to be that as such evidence is exceptional, it should be confined to narrow limits, and admitted only as a part of the evidence of pedigree, or relationship, and when that fact is a material inquiry.

EDMUND H. BENNETT.

Boston.

RECENT CANADIAN DECISIONS.

Queen's Bench of Manitoba.

McCAFFREY v. THE CANADIAN PACIFIC RAILWAY CO.

A railway company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, &c., even when these are packed with the baggage for which they are liable.

When goods remain at the station at which a passenger alights, but it does not appear that the railway company has charged, or is entitled to charge, for storage, the company is not liable as warehousemen.

THIS was a motion to set aside a nonsuit and grant a new trial. The facts are fully cited in the opinion.

J. H. D. Munson, for plaintiff.

J. A. M. Aikins, for defendants.

The opinion of the court was delivered by

TAYLOR, J.—In the month of April 1882, plaintiff's wife purchased from the agent of the Great Western Railway Company, in